

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

§

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEITH RUSSELL,

Defendant.

NO. CR23-142 TL

MOTION TO CONTINUE STIPULATED
FACTS TRIAL

In September, this Court entered an order rescheduling the stipulated facts trial in this case for November 13, 2024. Dkt. 86. A week before the scheduled trial, the Court granted defendant Keith Russell's motion to suppress the evidence found during a search of his car, including the firearm that Russell is charged with possessing in violation of 18 U.S.C. § 922(g)(1). Dkt. 89. The United States has a statutory right to seek review of a suppression order in these circumstances. This Court should thus continue the trial date so that the United States can consider whether to seek further review.

Title 18, United States Code, § 3731 gives the United States the right to bring an interlocutory appeal from an order suppressing material evidence in a criminal case. This statute is necessary because Double Jeopardy principles prevent the United States from appealing from a suppression order after jeopardy attaches.

1 The statute provides in relevant part that an appeal by the United States “shall lie
2 to a court of appeals from a decision or order of a district court suppressing or excluding
3 evidence or requiring the return of seized property in a criminal proceeding” on two
4 conditions: the appeal may not be taken “after the defendant has been put in jeopardy and
5 before the verdict or finding on an indictment or Jinformation,” and the United States
6 Attorney must “certif[y] to the district court that the appeal is not taken for purpose of
7 delay and that the evidence is a substantial proof of a fact material in the proceeding.”
8 18 U.S.C. § 3731. The statute also provides thirty days to bring such an appeal: “The
9 appeal in all such cases shall be taken within thirty days after the decision, judgment or
10 order has been rendered and shall be diligently prosecuted.” *Id.*

11 The “purpose of § 3731 is to give the government a window of opportunity to
12 challenge a district court’s exclusion of allegedly material evidence before jeopardy
13 attaches.” *United States v. W.R. Grace*, 526 F.3d 499, 505 (9th Cir. 2008) (en banc). This
14 Court should continue the November 13, 2024, trial to give the United States time to
15 vindicate that purpose and consider whether to seek reconsideration or to appeal the
16 Court’s suppression order. Proceeding with the trial now, without the suppressed firearm,
17 would result in an acquittal or require the government to dismiss the indictment and would
18 thus impermissibly frustrate the United States’ the ability to seek further review of the
19 suppression order. *Cf. United States v. Biddle*, 467 F. App’x 693, 696 (9th Cir. 2012)
20 (unpublished) (“We conclude, and the parties agree, that the district court erred in
21 dismissing the indictment while the interlocutory appeal on the suppression issue was
22 pending before us.”).

23 Granting a short continuance would not deprive Russell of his right to a speedy
24 trial. Russell has waived his speedy trial rights through November 30, 2024. Dkts. 51.1,
25 86. And his speedy trial clock has not run in any event because of excludable time under
26 18 U.S.C. § 3161(h).
27

1 The thirty-day deadline in Section 3731 will run on December 6, 2024. The United
2 States has been diligently reviewing whether to seek further review since the court entered
3 the suppression order. But the U.S. Attorney’s Office cannot make a decision on how to
4 proceed without consulting with the Criminal Division of the Department of Justice and
5 the Office of the Solicitor General. 28 C.F.R. 0.20(b). Section 3731 provides a thirty-day
6 period to appeal from a suppression order—more than the standard 14-day period in
7 criminal cases—in part because of the need for these consultations. And it contains
8 corresponding protections for the defendant by requiring the U.S. Attorney to certify that
9 the suppressed evidence is material and that the appeal is not taken for purposes of delay.
10 *Grace*, 526 F.3d at 491 (9th Cir. 2008). Proceeding with trial now would disrupt that
11 balance. And in this case, the United States also needs to review the transcript of the
12 suppression hearing in order to determine whether to seek further review. It ordered a
13 “rush” copy of that transcript one day after the suppression decision. Dkt. 90. It expects
14 to receive the transcript by November 15, 2024.

15 In circumstances similar to those here, the Ninth Circuit has recognized that the
16 United States’s interest in “protecting its right to appeal” means that it “may request the
17 district court to stay proceedings pending appeal and, if refused, pursue the issue with this
18 court.” *United States v. Gatto*, 763 F.2d 1040, 1050 (9th Cir. 1985). This Court should
19 accordingly grant this motion and continue the trial date. If the United States appeals on
20 or before the December 6, 2024, deadline and makes the required certification, the trial
21 should be continued until the appeal is decided. If the United States instead moves for
22 reconsideration before this Court, the trial date can be reset once the motion is decided. If
23 the United States determines against seeking further review, it will likely voluntarily move
24 to dismiss the indictment.

1 For these reasons, the government respectfully requests the Court briefly continue
2 the stipulated facts trial date to provide the government opportunity to review of the record
3 and make a determination on seeking reconsideration or further review.
4

5 November 12, 2024
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7 Respectfully submitted,

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